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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re T.M. Shea Products, Inc.

Serial No. 76/312,356

Douglas J. McEvoy of Gifford Karss Groh Sprinkle Anderson & Citkowski for T.M. Shea Products, Inc.

Glenn Mayerschoff, Trademark Examining Attorney, Law Office 106 (Mary Sparrow, Managing Attorney).

Before Hohein, Bucher and Holtzman, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

T.M. Shea Products, Inc. seeks registration for the mark POWERTOWER on the Principal Register for "Merchandising point of purchase displays constructed of metal, namely both stand-alone displays and those for use with existing gondola displays for merchandising products," in International Class 20.<sup>1</sup>

This case is now before the Board on appeal from the final refusal to register the mark POWERTOWER based upon

<sup>1</sup> Application Serial No. 76/312,356 was filed on September 14, 2001 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce.

Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d). The Trademark Examining Attorney has held that applicant's mark, when used in connection with the identified goods, so resembles the mark POWER TOWER which is registered for "plastic merchandising display," also in International Class 20,<sup>2</sup> as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney have fully briefed this appeal but applicant did not request an oral hearing.

We affirm the refusal to register.

Applicant contends that the goods are different, that the marks are different, and that all the combinations of the words POWER and TOWER already co-existing in marks on the federal trademark register mandate that the cited registration be accorded a narrower range of protection than that accorded it by the Trademark Examining Attorney.

Our determination under Section 2(d) is based upon an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d

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<sup>2</sup> Registration No. 1,136,211, issued on May 27, 1980; Section 8 affidavit accepted and section 15 affidavit acknowledged; Renewed.

1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

With respect to the goods, it is not necessary that registrant's and applicant's goods be identical in order to support a finding of likelihood of confusion. It is sufficient that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that would give rise, because of the marks used in connection therewith, to the mistaken belief that the goods originate from or are in some way associated with the same source. In re International Telephone and Telegraph Corp., 197 USPQ 910 (TTAB 1978).

We find that applicant's metal merchandising displays and registrant's plastic merchandising displays are related. As argued by the Trademark Examining Attorney:

"In the present case both applicant's goods and registrant's goods are sold for use in displaying merchandise. The fact that one is metal and the other plastic won't avoid confusion because merchants and others needing to display products could use either type for the same purpose. While persons needing displays may recognize plastic is different than metal there is no reason to conclude from that fact alone that likelihood of

confusion of the source of those goods is not present. The fact that the goods of the parties differ in material composition is not controlling in determining likelihood of confusion. The issue is not likelihood of confusion between particular goods, but likelihood of confusion as to the source of those goods. See *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984) and cases cited therein, TMEP §§1207.01 *et seq.*"

(Trademark Examining Attorney's appeal brief, unnumbered pages 2 - 3).

Moreover, we note that the Trademark Examining Attorney has introduced into the record a number of use-based, third-party registrations which show that these trademark owners have registered the same mark for both metal merchandising display units and plastic merchandising display units. Third-party registrations which individually cover both types of goods and which are based on use in commerce serve to suggest that the listed goods are of a type that may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

We next turn to compare the respective marks. In doing so, we find that applicant's mark POWER TOWER and the cited registered mark POWER TOWER are virtually identical. The marks are identical in sound and meaning, and are very similar in appearance. The deletion of a space between the words does not serve to distinguish these two marks.

Purchasers are unlikely to remember that minor difference between the marks due to the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of the many trademarks encountered. That is, the purchaser's fallibility of memory over a period of time must also be kept in mind. See Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and Spoons Restaurants Inc. v. Morrison Inc., 23 USPQ2d 1735 (TTAB 1991), aff'd unpub'd (Fed. Cir., June 5, 1992).

Accordingly, we find that these two marks create virtually the same overall commercial impressions.

We turn next to applicant's contention that the registered mark has been shown to be so weak that its scope of protection should be significantly narrowed. In support of this proposition, applicant has made of record copies from the Office's Trademark Electronic Search System (TESS) of seven registrations and three pending applications with trademarks having the word "power" immediately before the word "tower."

First, we note that applications have virtually no probative value on the issue of registrability, as they are evidence only of the fact that the applications were filed.

Second, a registration based on Section 44 of the Act does not evidence use in the United States.

Third, with regard to the weight given to the remaining third-party registrations, even these registrations are not evidence of use in the marketplace or that the public is familiar with them. Thus, we cannot assume that the public will come to distinguish between them. As the Court of Appeals for the Federal Circuit stated in the case of Olde Tyme Foods Inc. v. Roundy's Inc., 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992):

"Under du Pont, '[t]he number and nature of similar marks in use on similar goods' is a factor that must be considered in determining likelihood of confusion. 476 F.2d at 1361, 177 USPQ at 567 (factor 6). Much of the undisputed record evidence relates to third party registrations, which admittedly are given little weight but which nevertheless are relevant when evaluating likelihood of confusion. As to strength of a mark, however, registration evidence may not be given any weight. AMF Inc. v. American Leisure Prods., Inc., 474 F.2d 1403, 1406, 177 USPQ 268, 269 (CCPA 1973)('The existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them. ...') [emphasis in original]."

Moreover, we note that the goods of the prior registrations (i.e., those based on use in commerce) are not at all closely related to merchandising displays. Specifically, the goods in these registrations are motorized CD racks for consumers, computers and computer

peripherals, modular furniture channel/columns, mounting brackets for mobile antennas, and industrial cooling towers. Accordingly, with the introduction of these registrations, applicant has not even established conceptually that the cited mark is a weak one.

In any event, even weak marks are entitled to the statutory presumptions of Section 7(b) of the Act, and hence should be protected against the registration by a subsequent user of a nearly identical mark for goods used for the same purposes. See Hollister Incorporated v. Ident A Pet, Inc., 193 USPQ 439 (TTAB 1976).

Finally, each case must be decided on its own merits, on the basis of the record therein. See In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001). See also In re Kent-Gamebore Corp., 59 USPQ2d 1373 (TTAB 2001); and In re Wilson, 57 USPQ2d 1863 (TTAB 2001).

In conclusion, we find that these goods are closely related, that the marks are nearly identical in overall commercial impression, and that applicant has failed to demonstrate the weakness of the cited mark for these and related goods.

Decision: The refusal to register is affirmed.